

SELF-REFERRAL ACT ADVISORY OPINION
RE: AnuVa Diagnostics, L.L.C.

REQUEST

On May 26, 2017, AnuVa Diagnostics, L.L.C. (“Diagnostics”) submitted an application to the Board of Health Professions for an advisory opinion to clarify whether its proposed subcontracted services agreement with AnuVa-Genesis, L.L.C. (“AnuVa”) is compliant with the Virginia Practitioner Self-Referral Act (“Act”), Virginia Code §§ 54.1-2410-2414.

FACTS

Diagnostics is a Delaware limited liability company that provides management, administrative, marketing, and clinical oversight services on behalf of ancillary healthcare companies (each a “Facility” and collectively, “Facilities”). AnuVa is a Delaware limited liability company that will perform similar oversight services for the Facilities through a subcontracted services agreement with Diagnostics. The majority of AnuVa’s ownership interest will be held by physician investors who are medical doctors licensed to practice in the Commonwealth of Virginia.

Diagnostics proposes an arrangement in which physician investors may refer patients to the Facilities that have a contract with Diagnostics to receive services and then those services are performed by AnuVa through a subcontracted services agreement between Diagnostics and AnuVa. The subcontracted services to be provided by AnuVa will be ancillary in nature. Diagnostics will pay AnuVa a monthly service fee equal to twenty-two percent of net collected revenue. AnuVa and Diagnostics also will enter into a Resources Agreement stipulating that Diagnostics will provide AnuVa with management and administrative services, office space, facilities, equipment, and staffing. In exchange, AnuVa will pay Diagnostics a monthly resources fee equal to three percent of the gross collected revenue. The service and resource fees

will be evaluated annually to ensure such compensation remains at a fair market value. Diagnostics assures any non-fair market valued services would be corrected promptly.

Diagnostics states that AnuVa's prospective physician investors may want to use the diagnostic testing services or other products of the ancillary healthcare companies in concert with the subcontracted services provided by AnuVa. Diagnostics avers there is no requirement under any agreement that the investor physicians directly or indirectly refer patients to a healthcare company receiving services from AnuVa.

VIRGINIA PRACTITIONER SELF-REFERRAL ACT

Under the Act, a health care practitioner is prohibited from referring a patient for health services to an entity outside his office or group practice if he or any immediate family member is an investor in such an entity, unless the Board of Health Professions grants an exception or unless certain other conditions are met. The following definitions, found in Va. Code § 54.1-2410, are pertinent to this discussion:

“Entity” means any person, partnership, firm, corporation, or other business ... that delivers health services.

“Investment interest” means the ownership or holding of an equity or debt security, including, but not limited to, shares of stock in a corporation

“Investor” means an individual or entity directly or indirectly possessing a legal or beneficial ownership interest, including an investment interest.

“Referral” means to send or direct a patient for health services to another health care practitioner or entity outside the referring practitioner's group practice or office practice or to establish a plan of care which requires the provision of any health services outside the referring practitioner's group practice or office practice.

QUESTION

Do the proposed actions of physician investors in AnuVa implicate the Virginia Self-Referral Act?

In order to determine if the Act will be implicated, the proposed arrangement must be evaluated to determine if physician investors in AnuVa have an investment interest in or are investors in the entity to which they are referring patients. In this case, the entities are the Facilities that have a contract with Diagnostics to receive services and then those services are performed by AnuVa through a subcontracted services agreement between Diagnostics and AnuVa. Based on information provided by Diagnostics, the subcontracted services agreement does not create any ownership or investment interest in the Facilities.

It is evident that physician investors in AnuVa do not maintain an investment interest in the Facilities. The issue then becomes whether the proposed arrangement creates a legal or beneficial ownership interest in the Facilities.

“Legal or beneficial ownership interest” is not defined by the Act. Black’s Law Dictionary defines a “legal owner” as one who has title to property even if the title may actually carry no rights to the property other than a lien. It defines a “beneficial owner” as “one who does not have title to property but has rights in the property which are the normal incident of owning the property.”

It is clear from the application that physician investors in AnuVa have an investment interest in AnuVa. The existence of the described subcontracted services agreement does not appear to make the physicians investors in the Facilities to which physicians may make referrals. Based on the facts provided, the physicians do not appear to be legal owners of the Facilities. While the physicians could potentially benefit from the Facilities, the proposed compensation agreement between Diagnostics and AnuVa does not appear to provide rights that are within the normal incident of ownership of the Facilities, and therefore there is also not a beneficial interest in the Facilities.

CONCLUSION

The proposed arrangement does not create an investment interest in the Facilities. In addition, the financial relationship between AnuVa, Diagnostics, and the Facilities does not appear to provide the physicians with a direct or indirect investment interest in the Facilities. Finally, it appears that physician investors have no other legal or beneficial ownership with the Facilities and, as such, are not investors in the Facilities.

Therefore, the Committee, pursuant to 18 VAC 75-20-60(E), recommends the following to the Board of Health Professions:

Since physician investors do not have an investment interest in the Facilities that have a subcontracting services agreement with AnuVa as defined by the Act, and since the arrangements do not create a legal or beneficial ownership interest in the Facilities, the Act does not apply to the proposed arrangement.